

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MICHAEL WALTER PAYETTE ,

Plaintiff,

v.

Case No. 2:10-cv-256
HON. R. ALLAN EDGAR

DENISE GERTH, et. al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Michael Walter Payette, a Michigan state prisoner in the custody of the Michigan Department of Corrections, brings this federal civil rights action under 42 U.S.C. § 1983. Defendants Denise Gerth, Denver McBurney, Lyle Rutter, Daniel Lesatz, Jeffrey Contreras, David Bergh, and Patricia Caruso move for summary judgment pursuant to Fed. R. Civ. P. 56 on the ground that plaintiff Payette failed to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a). [Court Doc. Nos. 8, 11].

On July 14, 2011, Magistrate Judge Timothy P. Greeley submitted his report and recommendation. [Court Doc. No. 21]. The Magistrate Judge recommends that the motions for summary judgment be granted and the plaintiff's entire complaint be dismissed. The parties have not timely filed any objections to the report and recommendation.

After reviewing the record, the Court **ACCEPTS and ADOPTS** the report and recommendation pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and W.D. Mich. LCivR

72.3(b). Accordingly, the defendants' motions for summary judgment [Court Doc. Nos. 8, 11] are **GRANTED** pursuant to Fed. R. Civ. P. 56. The plaintiff's entire complaint and all claims brought against the defendants are **DISMISSED WITHOUT PREJUDICE** on the ground that plaintiff Payette failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

For the reasons expressed in the report and recommendation, the Court finds that any appeal by plaintiff Payette from the decision and judgment in this case would be frivolous and not taken in good faith. *McGore v. Wrigglesworth*, 114 F. 3d 601, 611 (6th Cir. 1997). Pursuant to 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24(a)(4)(B), the Court **CERTIFIES** that any appeal by plaintiff Payette from the judgment of this District Court would not be taken in good faith.

In the event that plaintiff Payette seeks to take an appeal to the Sixth Circuit Court of Appeals, this District Court shall assess and require him to pay the \$455 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless he is barred from proceeding *in forma pauperis* by the "three strikes" rule in 28 U.S.C. 1915(g). If the plaintiff is barred by the "three strikes" rule in 28 U.S.C. 1915(g), then he shall be required to pay the \$455 appellate filing fee in one lump sum.

A separate judgment will be entered.

SO ORDERED

Dated: August 5, 2011.

/s/ *R. Allan Edgar*
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

